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In the Supreme Court of the United States

OCTOBER TERM, 1984

DR. LEE ROY BLACK, Director of the Missouri Department of Corrections and Human Resources; DICK D. MOORE, Chairman, Missouri Board of Probation and Parole,

Petitioners,

vs.

NICHOLAS J. ROMANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether this Court's decisions in *Morrissey v. Brewer*, 408 U.S. 471 and *Gagnon v. Scarpelli*, 411 U.S. 778, require a state sentencing judge to affirmatively consider alternatives to incarceration before revoking probation that judge originally granted.

2. Whether the Due Process Clause should be extended to require state sentencing judges to affirmatively consider alternatives to incarceration during a probation revocation hearing.

3. Whether the decisions of the courts below applied the wrong standard in reviewing a state court decision in a habeas corpus case and improperly shifted the burden of proof to petitioners.

4. Whether the Eighth Circuit erroneously affirmed an unjustified remedy in a habeas corpus case under the circumstances.

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DR. LEE ROY BLACK, Director of the Missouri Department of Corrections and Human Resources; DICK D. MOORE, Chairman, Missouri Board of Probation and Parole,

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NICHOLAS J. ROMANO,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Missouri, granting respondent's petition for a writ of habeas corpus, is reported as *Romano v. Black,* 567 F.Supp. 882 (E.D. Mo. 1983). The complete text of this opinion is produced for this Court at Pet. A. 28-53. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, affirming the decision of the District Court, appears at 735 F.2d 319 (8th Cir. 1984). The complete text of this opinion is produced for this Court at Pet. A. 3-27.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1984 (P.A. 3). A petition for rehearing was denied on June 28, 1984. The petition for a writ of certiorari was filed on August 30, 1983 and granted on November 26, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fourteenth Amendment to the United States Constitution provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. Title 28 U.S.C. § 2254 reads in pertinent part as follows:

> "A. The Supreme Court, a justice thereof, a Circuit Judge, or a District Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

> B. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

3. Revised Missouri Statutes § 195.200(4) (1969) reads in pertinent part as follows:

> (4) Except as provided in paragraph (c) of subdivision (1) of subsection 1 of this section, for the offense of selling, giving or delivering any controlled substance listed in Schedule I or II to a person, by imprisonment in a state correctional institution for a term of not less than five years nor more than life imprisonment.

STATEMENT OF THE CASE

On November 15, 1976, Nicholas "Slick" Romano entered guilty pleas to a two count indictment charging him with the transfer and the sale of a controlled substance (J.A. 23-28). On April 13, 1977, the Honorable Dean Whipple, Judge of the Circuit Court of Laclede County, Missouri, sentenced Romano (herein referred to as respondent) to two terms of 20 years to be served concurrently. Execution of said sentences was suspended and respondent was placed on probation for five years (J.A. 41). On June 15, 1977, respondent was involved in a traffic accident which led to his being charged with the felony of leaving the scene of an accident. On July 18, 1977, respondent's probation was

revoked and he was ordered incarcerated (J.A. 102). The charge of leaving the scene of an accident was subsequently reduced and respondent was convicted of careless and imprudent driving on October 12, 1977.

On March 28, 1980, respondent filed a *pro se* motion for post conviction relief in the Circuit Court of Laclede County seeking to challenge the probation revocation proceedings. Said motion was overruled as the Court held that the proper remedy was to file a habeas corpus petition (Respondent Ex. I filed below). Respondent thereafter filed a petition for writ of habeas corpus in the Circuit Court of Cole County, Missouri, however, said petition was dismissed by the Circuit Court of Cole County on procedural grounds (Resp. Ex. G). Respondent thereafter went back to the Circuit Court of Laclede County where his motion for reconsideration of his request for post conviction relief was dismissed. Respondent filed a Notice of Appeal with the Missouri Court of Appeals, Southern District, but said appeal was dismissed.

On April 14, 1980, Respondent filed a petition for writ of error *coram nobis* challenging the constitutionality of his careless and imprudent driving conviction. Said petition was dismissed and respondent's out of time appeal to the Missouri Court of Appeals, Eastern District, was subsequently dismissed for failure to prosecute.

On June 12, 1981, respondent filed a petition for writ of habeas corpus with the United States District Court, Eastern District of Missouri, again challenging his conviction for careless and imprudent driving. On October 2, 1981, the Honorable John F. Nangle denied respondent's habeas corpus petition and ordered that his case be dismissed (Resp. Ex. K). On appeal from this dismissal respondent for the *first time* in federal court raised the

ground that his probation revocation was improper, this being some four years after he was incarcerated. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's dismissal and, as to the new ground, dismissed said claim without prejudice for failure to exhaust available state remedies (Resp. Ex. L).

On October 4, 1982, respondent filed a habeas corpus petition with the Missouri Supreme Court challenging his probation revocation. On October 18, 1982, the Missouri Supreme Court denied said petition without opinion (Resp. Ex. N). Thereafter, respondent filed the petition for writ of habeas corpus with the United States District Court for the Eastern District of Missouri which has led to this grant of certiorari.

During the taking of respondent's guilty plea in 1976, he was interrogated by the Court in connection with his past, the incident which led to the charges and the voluntary nature of his plea. Respondent's crime concerned his possession of 26 pounds of marijuana. It appears that respondent was attempting to trade this marijuana for opium or heroin. Respondent had harvested the marijuana, refined it and packaged it into 26 one pound plastic bags (J.A. 27). A pre-sentence investigation was ordered. On April 13, 1977, hearing was held on respondent's sentencing. At the sentencing hearing respondent testified and there was also testimony by a man who identified himself as the respondent's employer. Respondent's counsel also introduced a psychological evaluation which was rendered by one Sheldon Silk and an affidavit by a man named Clark. Respondent's counsel then made a statement to the Court in support of the Court's granting the respondent probation. Respondent's counsel discussed the fact that the pre-sentence investigation report as well as in the evaluation by Mr. Silk, that the respondent had trouble reconciling

himself with authority figures. Respondent's counsel urged that the respondent be placed on probation (J.A. 37-40). Thereafter, the trial judge, the Honorable Dean Whipple, indicated that he had "labored with this case" for some time and that he had decided to place the respondent on probation (J.A. 43). This decision was contrary to the recommendation of the pre-sentence investigation report and the recommendation of the prosecutor. On June 14, 1977, only approximately two months after the respondent was placed on probation, the incident which led to his probation revocation occurred. A hearing was held on July 18, 1977, before Judge Whipple concerning this probation violation and the respondent's probation was revoked.

At respondent's probation revocation hearing in 1977, he was represented not by one but by two attorneys. At the hearing Mr. Gerald Saunders testified that at approximately 2:00 a.m. on June 14, 1977, he was standing in front of the Stein Club in Columbia, Missouri, when he saw a Datsun speeding down Broadway, swerve over the center line, make a U-turn and come back by the Stein Club, swerving into the parking area. At the time the car struck one Timothy Bradley. Mr. Saunders saw the car then swerve to stop and Miss Jody Seificas and Mr. Terry DeHaven got out of the car. The car then pulled across the street into a parking area and when Saunders looked again it was gone. Saunders then testified that in a later conversation Terry DeHaven informed him that the respondent was driving the automobile (J.A. 58-65).

Police Officer Larry Wright testified that he arrived at the scene after he received a radio dispatch and began to interview witnesses. Upon questioning Jody Seificas, she indicated that she had been riding in the vehicle involved in the accident and that the driver was respondent. Police

Officer Wright also testified that upon interviewing Saunders, he was informed that Saunders saw Seificas get out of the driver's side of the car but that it appeared to Saunders that she got out of the back seat of the car (J.A. 68-77). There was also testimony from the mother of the victim, the father of the victim, and the victim's sister, that on the next afternoon they were visiting Timothy Bradley in his hospital room when the respondent came to the room. Mrs. Bradley stated that the respondent told her son "It's too bad you jumped in front of me." (J.A. 79). Timothy Bradley's sister, Colleen Hilbert, testified that the respondent stated "Too bad you had to jump right in front of me like that, it was a nightmare." (J.A. 83). Mr. Bradley testified that the respondent stated "Why did you jump out in front of me?" (J.A. 87). There was similar testimony that from the time of the accident until approximately an hour after the respondent's arrest there were no calls to the police station by anyone identifying themselves as James Romano reporting an accident and in fact no one claiming to be a driver or a passenger of a car called in to report the accident (J.A. 89).

Jody Seificas when first called to testify refused to reveal any information concerning the night of the incident, claiming her Fifth Amendment rights. Upon being recalled, Seificas admitted that she told a police officer on the night of the accident that she had been a *passenger* in the car (J.A. 90-94). Thereafter, respondent called one witness to testify that he was in the hospital room with the respondent and other witnesses and that he did not hear the statement attributed to the respondent, although statements could have been made which he did not hear. The case was then extensively argued by respondent's counsel (J.A. 98). Following a short recess, the court informed the respondent that he was going to revoke probation.

Following respondent's probation revocation he was incarcerated in the Missouri Department of Corrections and Human Resources until December 1982, when he was granted a parole.

SUMMARY OF ARGUMENT

The actions of the courts below were without precedent and wholly unjustified. After an extensive hearing that accorded Respondent James "Slick" Romano a full measure of due process, the state trial judge, whom the record in this case reveals to be conscientious and scrupulous to a fault, determined that respondent had violated the probation the judge previously had awarded by committing another felony, and executed the sentence he originally had suspended. The courts below held: (1) that the trial judge, even though he had already considered alternatives to incarceration at the original sentencing, was required to reconsider those alternatives before imposing the original sentence; (2) that the State of Missouri in this habeas corpus proceeding was required to prove that the trial judge had considered alternatives to incarceration, the trial judge's statement that he had done so being insufficient; and (3) that respondent should be unconditionally released, the State of Missouri being given no opportunity to correct the alleged errors the lower courts found. No decision by this Court authorizes, even by implication, the first holding. The latter two holdings are flatly contrary to the established precedent of this Court.

Morrissey and *Gagnon* do not require a sentencing judge who has granted a defendant probation to reconsider alternatives to incarceration before revoking that probation. In fact, no prior decision of this court so holds. This Court has maintained that the minimal requirements of

Due Process in probation revocation hearings are narrow and limited. The record reveals that respondent received all the process he is due from a thorough and scrupulous judge.

This Court has established that the minimal requirements of Due Process in probation revocation hearings are only that a probationer be given written notice of the alleged violation and that he be made aware of the evidence against him, that he be given an opportunity to appear and present evidence and confront the witnesses against him, and that a "neutral and detached" officer decide the case and issue a written statement of findings and reasons for revocation. It is undisputed that respondent was given these safeguards. The courts below, without citation to a single supporting Supreme Court case, held that respondent was entitled to the additional protection of an affirmative consideration of alternatives to incarceration, despite the fact that any such alternatives had been considered when respondent was originally sentenced.

The lower courts were wrong when they read into *Morrissey* and *Gagnon* the new requirement of a consideration of alternatives to incarceration. The Eighth Circuit's opinion contradicts the clear import of Supreme Court decisions in this area. In the most recent discussion of probation revocation by this Court, this court clearly avoided reliance on *Morrissey* and *Gagnon* to support its ruling that a probationer was entitled to a consideration of alternatives. This Court expressly limited this requirement to situations where a person loses probation due solely to his indigency.

Remarkably, the Eighth Circuit refused to require a consideration of alternatives to incarceration when it recently reviewed a probation revocation by one of its own

district courts. The Eighth Circuit relied on *Morrissey* and *Gagnon*. In the present case, however, the Court offered no justification for requiring a state to provide more Due Process than a federal court in similar circumstances.

Although the Eighth Circuit relied on a Missouri Supreme Court case to support its holding, Missouri law does not provide the support desired. Missouri Supreme Court cases stand only for the proposition that a state judge must give a probationer the *opportunity* to present alternatives to incarceration. If this opportunity is utilized, then the court is *presumed* to have considered those alternatives. In the present case, respondent was given an opportunity to present alternatives to his incarceration and he failed to do so.

The Due Process Clause should not be extended to require an affirmative consideration of alternatives to incarceration for several compelling reasons. First, a sentencing judge necessarily considers alternatives to incarceration at the time probation is granted. There is no need to require that this process be affirmatively duplicated during a revocation hearing. It can fairly and reasonably be assumed that a sentencing judge is cognizant of the alternatives to incarceration he considered earlier and that he has considered them anew.

Second, this Court's recent pronouncement on the consideration of alternatives to incarceration clearly limited such a requirement to cases where probation is revoked due solely to the defendant's indigency.

Third, in that the decision to incarcerate rather than continue on probation is a subjective one based on abstract factors, a requirement that a judge explain why certain alternatives were rejected would be overburdensome. That would be very much like requiring a judge to explain why one witness is more "credible" than another.

Finally, expanding Due Process as the Eighth Circuit has done would violate the principle of comity. Federal courts would be able to reverse state courts by merely discovering some imaginative "alternative" to a particular inmate's incarceration that the state judge failed to consider. Moreover, the Eighth Circuit's holding could easily be extended to the sentencing phase of a trial, thus spreading the encroachment by the Eighth Circuit on state courts.

The courts below shifted the burden of proof to the state and away from the habeas corpus petitioner. The court relied on the absence of an *affirmative* consideration of alternatives to incarceration and required petitioners to prove otherwise. To compound this impropriety, the district court refused to give petitioners an opportunity to carry that burden when it refused to grant an evidentiary hearing. This put petitioners in a terrible Catch-22 situation.

The courts below should not have required proof that respondent's probation was not unconstitutionally revoked. Had the Eighth Circuit given the state judge's findings the presumption of correctness to which they are entitled, there would have been a more than adequate basis for finding that the state judge properly revoked respondent's probation. Instead, the Eighth Circuit distorted the facts in an attempt to mitigate and refute the state judge's findings. This was reversible error.

Finally, the Eighth Circuit was wrong to affirm respondent's outright release. A release from custody is a drastic remedy reserved for only the most extreme circumstances. The record clearly reveals that the district court below had no reasonable grounds for depriving the State of Missouri of an opportunity to correct the alleged Due Process defect. This Court's prior rulings demonstrate the error of the Eighth Circuit's ways, justifying a reversal.

Accordingly, this Court must instruct the courts below as to the limits of Due Process in a probation revocation hearing and hold that a sentencing judge is not required to affirmatively consider alternatives to incarceration before revoking probation.

ARGUMENT

I. *MORRISSEY* AND *GAGNON* DO NOT REQUIRE A SENTENCING JUDGE WHO HAS GRANTED A DEFENDANT PROBATION TO RECONSIDER ALTERNATIVES TO INCARCERATION BEFORE REVOKING THAT PROBATION.

No decision of this Court holds that a state sentencing judge must affirmatively consider alternatives to incarceration when he justifiably revokes a probation he previously has granted, and the Due Process Clause should not be interpreted to require a judge to do so.

A) The minimal requirements of Due Process in probation revocation hearings are narrow and limited and respondent received all the process that is due.

This Court stated the minimal constitutional requirements for Due Process in a probation revocation hearing in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973). In *Gagnon*, this Court held that the Due Process previously required for parole revocation in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 44 (1972), is also required when probation is revoked. This Court held that a probationer, after initially being charged with violating a condition of his probation, must be given a preliminary hearing. *Gagnon, supra*, 411 U.S.

at 784, 93 S.Ct. at 1760. The purpose of the hearing is to determine if probable cause exists to believe that the probationer has violated a condition of his probation. *Gagnon, supra,* 411 U.S. at 784, 93 S.Ct. at 1760, *citing Morrissey, supra,* 408 U.S. at 487, 92 S.Ct. at 2603.

In the final revocation hearing, *Morrissey* and *Gagnon* hold as the "minimum requirements of Due Process" that a probationer be given:

> (a) written notice of the claimed violation of [probation or] parole;
>
> (b) disclosure to the [probationer or] parolee of evidence against him;
>
> (c) an opportunity to be heard in person and to present witnesses and documentary evidence;
>
> (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
>
> (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
>
> (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking [probation or] parole.

Gagnon v. Scarpelli, supra, 411 U.S. at 786, 92 S.Ct. at 1762, *citing Morrissey v. Brewer, supra* at 489, 92 S.Ct. at 2604.

The record reveals that the Honorable Dean Whipple scrupulously accorded respondent *every* one of these constitutional safeguards. Respondent was given a preliminary hearing (Joint Appendix, hereinafter "J.A." 48) even though he was not entitled to one as he was already under arrest. See *Moody v. Daggett,* 429 U.S. 78, 86, n.7, 97 S.Ct.

274, 50 L.Ed.2d 236 (1976). Moreover, respondent was given written notice of the charges against him (J.A. 48). Certainly, during the hearing respondent was made painfully aware of the evidence against him and was given substantial leeway in the cross-examination and confrontation of the State's witnesses. Although a judge is not necessary, respondent was awarded a "neutral and detached" judicial officer as well as a full written statement by that officer of his findings and the reason for revocation of probation (J.A. 107).

B) The lower courts' reading of *Morrissey* and *Gagnon* is contradictory to this Court's prior rulings.

The Eighth Circuit and the district judge below did not hold that *any* of the specific Due Process requirements were denied respondent, but instead held that respondent was denied a heretofore unrecognized right to have alternatives to his incarceration considered during his probation revocation hearing. *Romano, supra,* 735 F.2d 322-323 (Petitioner's Appendix, hereinafter "P.A.", 18-22); *Romano, supra,* 567 F.Supp. at 887 (P.A. 51-52). It is the position of petitioners that the Eighth Circuit erred when it affirmed the District Court's creation of a new Due Process requirement for probation revocation hearings.

Neither *Morrissey* nor *Gagnon* can fairly be read, as the lower courts read them, to require a sentencing judge to consider alternatives to incarceration before revoking probation. One reason is that such a reading would be inconsistent with the language this Court used in deciding *Morrissey* itself:

> If it is determined that petitioner's admitted parole violations to the Parole Board, as Iowa contends, and if

> *those violations are found to be reasonable grounds end the matter. Morrissey, supra*, 408 U.S. at 490, 92 S.Ct. at 2605 (emphasis added).

The italicized part of that statement simply cannot be squared with a reading that a parole board (or, as in this case, a sentencing judge) *must*, as a matter of constitutional compulsion, consider alternatives to incarceration.

A second reason is that this Court itself has not read *Morrissey* or *Gagnon* to require a consideration of alternatives. The conclusive illustration of this is *Bearden v. Georgia*, ... U.S. ....., 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). *Bearden* held that a sentencing judge must consider alternatives to incarceration before revoking the probation of a probationer who has merely failed to make financial restitution due to indigency. The opinion was crafted with painstaking care both to justify the requirement that alternatives be considered and to limit the situations to which that requirement applied. Both *Morrissey* and *Gagnon* were analyzed extensively in *Bearden*. But if the lower courts' reading of *Morrissey* and *Gagnon* in the instant case is correct, and a sentencing judge *must* consider alternatives during a revocation hearing then the careful opinion in *Bearden* is nothing but surplusage, and *Bearden* would have been decided by a routine citation to *Morrissey* and *Gagnon*. It is simply inconceivable that not a single member of this Court would have made that argument in *Bearden* if, as the lower courts held, that is the proper interpretation of *Morrissey* and *Gagnon*. As noted by Justice White when he considered a requirement that alternatives to incarceration must be considered as part of Due Process "there is *no* support in our cases, or in my view, the Constitution, for this *novel* requirement." *Bearden, supra*, 103 S.Ct. at 2074 (emphasis added).

C) The Eighth Circuit itself does not require its district judges to consider alternatives to incarceration when revoking probation.

Remarkably, the Eighth Circuit has also previously dealt with the question of whether *Morrissey* and *Gagnon* require a sentencing judge to expressly consider alternatives to incarceration before revoking probation. In *United States v. Burkhalter,* 588 F.2d 604 (8th Cir. 1978), a federal probationer's probation was revoked after a determination that he had failed to take vocational training and to comply with the rules of a halfway house where he was assigned. On appeal, Burkhalter argued that the trial judge failed to prove that he violated a condition of his probation, relied on hearsay to revoke his probation and failed to consider alternatives to incarceration, complaints strikingly similar to those originally alleged by the respondent in this case.

The Eighth Circuit relied on *Morrissey* and *Gagnon* to assess the Due Process claims alleged in *Burkhalter* as they did in the present case. However, they reached a decidedly different result. The Court noted Burkhalter's "absenteeism at school, generally poor attitude towards his work, and lack of attention to the rules and regulations of the halfway house." *Id.* at 607. This was seen as indicative of Burkhalter's "inability to accept responsibility and live within the rules of his probation". *Id.* The Court went on to say that "the district court *presumably* considered these facts in determining whether appellant's chances of becoming a useful citizen would be better served if he successfully completes a probationary program or if he is imprisoned. Under the circumstances, the district court did not abuse its discretion in finding that treatment had failed or was about to fail and ordering

appellant's probation revoked." *Id.* (emphasis added). Clearly, in *Burkhalter*, the Eighth Circuit did not feel *Morrissey* and *Gagnon* required that a judge expressly consider alternatives to incarceration before revoking probation.

Since *Burkhalter* utilized the same *Morrissey* and *Gagnon* Due Process analysis the court used in the present case, it appears the Eighth Circuit is requiring more due process for state probationers than federal probationers. In the eyes of the Eighth Circuit, a federal judge is entitled to broader discretion and greater deference than a state judge. The Eighth Circuit had absolutely no justification for requiring a higher constitutional standard of all state courts than it required for its own federal district courts. Even though *Burkhalter* was cited and argued by petitioners, the Eighth Circuit did not overrule, distinguish, or even cite *Burkhalter* or in any manner explain how or why it can require a state court to give a probationer more Due Process protection than it requires for federal probationers based on the exact same Supreme Court cases and constitutional analysis. This glaring inconsistency alone warrants reversal.

The Eighth Circuit in *Burkhalter* stated that "this court has traditionally given a great deal of latitude to the judge in a revocation proceeding." *Id.* at 606, citing *United States v. Strada*, 503 F.2d 1081, 1085 (8th Cir. 1974). Apparently state courts are not deserving of this traditional grant of latitude by the Eighth Circuit. Nonetheless, *Burkhalter* stands for the proposition that a sentencing judge need not affirmatively consider alternatives to incarceration before revoking probation, substantial evidence of the Eighth Circuit's error.

D) The State of Missouri does not require a judge to affirmatively consider alternatives to incarceration, but merely gives a probationer the right to introduce such alternatives pursuant to *Morrissey* and *Gagnon*.

In the present case, the Eighth Circuit also turned to the Missouri Supreme Court for support by its citation of *Abel v. Wyrick*, 574 S.W.2d 411 (Mo. banc 1978). The Eighth Circuit sought to establish that Missouri courts would agree with their holding that Due Process requires an affirmative consideration of alternatives to incarceration in every case of probation revocation. This is not true. After *Abel*, the Missouri Supreme Court again considered *en banc* the issue of whether an affirmative consideration of alternatives to incarceration is required in a sentencing judge's statement as to why probation was revoked. In *Sincup v. Blackwell*, 608 S.W.2d 389 (Mo. banc 1980), appellant Sincup had pled guilty to burglary. His sentence of eight years was suspended and he was placed on five years probation. One of the conditions of his probation was that he abstain from the consumption of alcohol. He violated this condition one month after receiving probation. His probation was subsequently revoked.

Before the Missouri Supreme Court, Sincup alleged, among other things, that the sentencing judge denied him Due Process by failing to expressly consider alternatives to incarceration before revoking his probation. *Sincup, supra*, 608 S.W.2d at 392. The Court held that Sincup's Due Process rights under *Morrissey* and *Gagnon* were not denied by the court's failure to affirmatively consider alternatives to incarceration. 608 S.W.2d at 393. In support of its holding the Court cited the Eighth Circuit's opinion in *Burkhalter*. *Sincup, supra*, 608 S.W.2d at 393.

The court in *Sincup* distinguished *Abel* because the trial judge in *Abel* expressly *refused to allow the probationer to offer mitigating evidence or alternatives* to his incarceration. The Court noted that Sincup's attorneys argued for alternatives to incarceration and this was determinative. Thus, the Missouri Supreme Court's rulings are more properly read as holding only that Due Process requires that a probationer be given an opportunity to present alternatives to incarceration as part of his right to an opportunity to be heard. Once such alternatives are offered, a reviewing court should assume these alternatives were considered absent clearly convincing evidence to the contrary.

In the respondent's guilty plea hearing in the present case, Judge Whipple considered the argument for probation as an alternative to incarceration as argued by respondent's attorneys. Respondent's attorneys did not reassert these arguments again during the probation revocation hearing but elected instead to contest the violation iteslf. There is no reason to assume that Judge Whipple did not nonetheless consider the arguments in favor of continued probation before revoking Romano's probation. Respondent had the opportunity to present more elaborate alternatives and he failed to do so. The duty of raising creative alternatives to incarceration should fall on the probationer or his attorneys, C. Long, Law Notes 14:13, 45-48 (summ. 1978). When Judge Whipple ordered and considered a presentencing report, he did more than can be legitimately required. In order to satisfy fundamental Due Process requirements of *Morrissey* and *Gagnon*, Judge Whipple's statement of reasons needed only to be sufficiently specific to enable a reviewing body to determine whether probation was revoked for an impermissible reason, or for no reason at all.

The proposition that Due Process requires only that a probationer be given an opportunity to present alternatives to incarceration can be found in *United States ex rel. Sims v. Sielaff*, 563 F.2d 821 (7th Cir. 1977); *Atkins v. Marshall*, 533 F.Supp. 1324 (D.C.S.D. 1982), and *Ready v. United States Parole Commission*, 483 F.Supp. 1273 (D.C. Pa. 1980). Moreover, it only makes sense, as creative alternatives to incarceration are more properly classified as the type of mitigating evidence a probationer might want to offer in his behalf to avoid incarceration. The right to introduce mitigating evidence has already been established in *Morrissey* and *Gagnon*.

It should also be noted that academic analyses of *Gagnon* and *Morrissey* do not suggest that these cases require that alternatives to incarceration be expressly considered in every case of probation or parole revocation.[1] Other lower courts agree.[2]

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1. As examples, petitioners ask this Court to consider the following exemplary sources: Project, *Thirteenth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1982-1983, 72 GEO. L.J. 185 (December, 1983); Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1981-1982, 71 GEO. L.J. 339 (December, 1982); Project, *Eleventh Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1980-1981, 70 GEO. L.J. 465 (December, 1981); Project, *Tenth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1979-1980, 69 GEO. L.J. 151 (December, 1980); Project, *Ninth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1978-1979, 68 GEO. L.J. 279 (December, 1979); 65 J. CRIM. L. & CRIMINOLOGY 46 (1974); Fisher, *Parole and Probation Revocation after* MORRISSEY *and* GAGNON; 11 U.Balt.L.Rev. 272, 296 (Winter '82); G. Killinger, H. Kerper & P. Cromwell, *Parole and Probation in the Criminal System*, 17-30 (1976); S. Rubin, H. Weihofen, G. Edwards & S. Rosenzweig, *The Law of Criminal Corrections*, 176-179 (1976).

2. For the proposition that, once a serious violation is proven, no further due process is needed. *See, Marishita v. Morris*, 702 F.2d 207 (10th Cir. 1983); *United States, v. Bazzano*, 712 F.2d 826 (3rd Cir. 1983); *United States v. Stine*, 675 F.2d 69 (3rd Cir. 1982) (held specifically that due process did not require an affirmative consideration of alternatives to incarceration).

II. DUE PROCESS SHOULD NOT BE EXTENDED TO REQUIRE SENTENCING JUDGES TO CONSIDER ALTERNATIVES TO INCARCERATION WHEN REVOKING PROBATION.

A) There is no need to expand the Due Process requirements of *Morrissey* and *Gagnon* as a sentencing judge necessarily considers alternatives to incarceration as a prerequisite to the original grant of probation.

The Eighth Circuit read too much into *Gagnon*. *Gagnon* "set forth the requirement of written findings in the context of an administrative hearing and did not directly deal with judicial probation and judicial revocation." *Marishita v. Morris*, 702 F.2d 207, 209 (10th Cir. 1983). When reviewing a state judge's probation revocation, a federal habeas court can look to the transcript of the proceedings for the judge's findings and reasons. *Marishita, supra*, 702 F.2d at 209. Legal scholars in the law of probation and parole agree with this position. See N. Cohen & J. Gobert, *The Law of Probation and Parole*, 641-642 (1983).

There is good reason to evaluate the reasons requirement differently when considering a sentencing judge's revocation of probation. "The sentencing court when revoking probation goes through the same kind of mental operation as when sentencing was pronounced in the first place." *United States v. Colvin*, 644 F.2d 703 (8th Cir. 1981). The sentencing judge necessarily is cognizant of the factors considered by that same judge during sentencing. Obviously, the mere fact that respondent was given probation is evidence that Judge Whipple considered the alternative to incarcerating respondent. Judge Whipple, in granting probation to respondent, stated "Mr. Romano, I've labored with this case for some time as I do with any

case where there is a possibility of sending somebody to the penitentiary." (J.A. 41). Judge Whipple then granted respondent's request for probation despite a pre-sentence report recommending immediate incarceration. When respondent reappeared before Judge Whipple so soon after receiving probation, Judge Whipple had *already* considered alternatives to incarcerating respondent, and in fact had once applied that alternative. Once Judge Whipple found that respondent had violated his probation by committing a felony, this indicated "to the Court that it erred in its original determination that the defendant did not need to serve his prison sentence in order to be rehabilitated." *United States v. Bazzano*, 712 F.2d 826, 839 (3rd Cir. 1983).

That this was Judge Whipple's reason for revoking respondent's probation is clear when you look to why Judge Whipple granted respondent probation in the first place. During respondent's probation hearing Judge Whipple stated:

> Now the reason I have considered placing you on probation is because this is an offense you have committed in possessing and selling and not an offense against the body or person of another individual involving another individual. (J.A. 43).

Clearly Judge Whipple saw respondent's probation violation as eliminating the only factor in favor of respondent receiving probation. Thus, in light of the factors Judge Whipple considered during sentencing, it is clear that there is no need for him to *reconsider* these same factors during revocation of probation.

Since an administrative board would not have originally granted probation, administrative boards have *not previously* considered alternatives to a particular proba-

tioner's incarceration. Judge Whipple gambled on an alternative to respondent's incarceration and lost. *Morrissey* and *Gagnon* did not require that he expressly reconsider alternatives when he revoked respondent's probation. Thus, when this Court reviews the transcript of the state proceedings, instead of limiting itself to the Statement of Findings, this Court will find that Judge Whipple necessarily considered alternatives to respondent's incarceration and there is no need to expand the *Morrissey* and *Gagnon* requirements to include an *affirmative reconsideration* of alternatives to incarceration when a sentencing judge revokes probation.

B) This Court's only pronouncement on the consideration of alternatives to incarceration painstakingly limited such a requirement.

This Court's most recent discussion of alternatives to incarceration and probation revocation hearings occurs in *Bearden v. Georgia*, ... U.S. ....., 103 S.Ct. 2064, 76 L.Ed. 2d 221 (1983). In *Bearden*, this Court held that a sentencing judge must consider alternatives to incarceration before revoking the probation of a probationer who has merely failed to make financial restitution through no fault of his own.

Because of the nature of this Court's analysis in *Bearden*, it is the position of petitioner that *Bearden* is limited to situations where a person's probation is revoked due to his poverty. This is evident from this Court's reliance on Equal Protection analysis based on *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) and *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). This has also been the conclusion of academic reviewers of the *Bearden* decision.[3]

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3. 12 Am.J.Crim.L. 91-97, March 1984.

In framing the primary legal issue facing this Court in *Bearden*, the Court stated: "today we address whether a court can revoke probation for failure to pay a fine and restitution *when there is no evidence that the petitioner was at fault* in his failure to pay or that alternative means of punishment were inadequate," *Id.*, 103 S.Ct. at 2069, n.7 (emphasis added). Clearly, from the outset, this Court saw the probationer's fault as being a material concern in deciding whether a trial court erred in failing to affirmatively consider alternatives to incarceration.

In deciding that the sentencing judge in *Bearden* should have considered alternatives to incarceration, this Court noted in another footnote: "In contrast to a condition like chronic drunken driving, however, the condition at issue here, indigency, is itself no threat to the safety or welfare of society". *Id.*, 103 S.Ct. at 2070, n.9. In contrast to the violation in *Bearden*, the violation by respondent, hit and run driving, is a clear threat to the safety and security of society. At best, *Bearden* requires a consideration of alternatives only when the probation violation is technical or unintentional. Thus, the state trial judge could have properly concluded that a convict who would run over a friend and leave him injured without stopping to help his victim, is not responsible enough for any sort of probation, especially when the convict offers no justification for his action.

C) It would be impossible for a court to say "why" alternatives to incarceration were rejected as this necessarily involves a subjective discretionary decision based on a myriad of factors.

The decision to grant some type of probation as an alternative to incarceration involves a great many factors,

many of which are applicable to every case.[4] The alternatives to incarceration required by *Bearden* are distinguishable in that they were concrete, i.e. reduce restitution, extend time for payments or allow back payments to be made up later. These alternatives can be considered in light of the concrete factor of the defendant's ability to pay. However, when a judge is considering the broader question of whether a probation violation is "serious" enough to indicate an "inability" or "reluctance" to achieve rehabilitation without incarceration is a judgment which necessarily deals with abstract principles.

Thus, to require a sentencing judge to detail "why" specific alternatives to incarceration were rejected would be much like requiring a judge to explain "why" one witness was more "credible" than another. Such reasons are simply ineffable. Due Process need require no more than a judge's statement as to the evidence, findings and conduct of the probationer that led to revocation.

D) An expansion of *Morrissey* and *Gagnon* to require a consideration of alternatives to incarceration would violate the principle of comity.

District Judge Cahill suggested that Judge Whipple should have "considered public service work, mandatory driver's training classes and even restitution to Timothy

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4. Common factors include: the defendant's attitude toward crime and rehabilitation, the defendant's truthfulness, the defendant's willingness to assist law enforcement efforts, the defendant's willingness or refusal to plead guilty, defendant's dangerousness, defendant's prior criminal record, prior arrest and uncharged misconduct, defendant's employment record, presentence report records, defendant's records, seriousness of crime and defendant's "credibility". See N. Cohen, J. Gobert, *The Law of Probation and Parole*, § 2.06-§ 2.27.

Bradley and his family as viable options." *Romano, supra,* 567 F.Supp. at 886 (P.A. 48). By this statement, the federal judge second-guessed the state judge and found that the state judge was at fault for failing to be more creative than he. If the concept of comity requires some deference and respect by federal courts to state courts, then the district court below has rejected this time honored concept. Petitioner need not engage in labored analysis to demonstrate to this court that, under the Eighth Circuit's opinion, any time a federal court can think up an imaginative alternative to incarceration not expressly considered and rejected by a state judge, that court can order a state prisoner released due to the state judge's failure to consider a "viable alternative".

Moreover, the holding by the Eighth Circuit threatens the integrity of state court sentencing. It is axiomatic that the liberty interest held by a parolee or probationer is substantially less than that held by a presumptively innocent criminal defendant. If a probationer's liberty interest is substantial enough to require a judge to consider alternatives to incarceration during probation revocation, then it is only a matter of time before the Eighth Circuit requires state judges to consider such alternatives during the sentencing phase of the trial.

As yet, the Due Process Clause does not require an affirmative consideration of alternatives to incarceration at the sentencing stage of a criminal trial. In *United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 592 (1972), the dissenting opinion noted: "In many cases it would be impossible to discern whether a sentencing judge had been influenced by his belief [about the evidence], since there is no requirement that reasons be given." *Id.,* 438 U.S. at 55, n.1, 98 S.Ct. at 2618, n.1 (Stewart, J., dissenting).

Requiring judges to affirmatively consider alternatives to incarceration would add more difficulty to an already serious task as noted by the D. C. Circuit Court of Appeals:

> We should not adopt an unrealistic view of the sentencing process that can only deter trial judges from articulating their reasons fully, because those reasons allow correction when the facts relied upon are indeed 'inaccurate'. Judges ought not be reprimanded for acknowledging the impact of the evidence presented during the trial unless the weighing in of such evidence compounds a just result. Accordingly, when cases of this nature are heard on appeal, we should review the record to ensure that there is a persuasive basis for the conclusions reached by the sentencing court. *United States v. Campbell*, 684 F.2d 141 (D.C. Cir. 1982).

Clearly, if state trial judges are burdened by the prospect of a federal judge second guessing their consideration of alternatives to incarceration, they are likely to defer more of their discretion to plea bargains and jury recommendations or, for self protection, to require extensive trial like sentencing hearings which are certain to add increased congestion to already congested state court dockets. "[C]onsiderations of comity and proper respect for the state courts counsel against precipitous action to invalidate their judgment. If, when viewed against the backdrop of all the facts, the state court decision may be found to be correct, it should not be overturned because it is based on less than all information which can be made available to the district court." *McNair v. New Jersey*, 492 F.2d 1307, 1309 (3rd Cir. 1974).

Finally, should the Eighth Circuit be affirmed, there is a substantial risk that every state in the union will be

burdened with writs of habeas corpus requesting an outright release due to a state judge's failure to consider alternatives to incarceration. Moreover, to the extent that the state writs are unsuccessful, the federal district courts would likewise be overburdened.[5]

III. THE COURTS BELOW ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO PETITIONERS BY REQUIRING PETITIONERS TO PROVE THAT ALTERNATIVES TO INCARCERATION WERE CONSIDERED.

A) The District Court required petitioners to prove that alternatives to incarceration were considered and deprived petitioners of an opportunity to carry that burden.

The courts below relied on the absence of an affirmative statement by Judge Whipple that he considered alternatives to respondent's incarceration to support their ruling that Judge Whipple failed to do so. This obviously put petitioners in the position of having to prove that alternatives were considered. However, even then, the District Court compounded its error by *denying* to petitioners an evidentiary hearing so that petitioners could carry the burden erroneously placed on their backs.

The reported decision of the district court contains the following language:

> The Court recognized that there was insufficient basis in the record upon which to render an informed deci-

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5. According to the Bureau of Justice Statistics in its report "Probation and Parole 1982", 1.5 million adults were on probation or parole. This included 1,335,359 on probation and 243,880 on parole. This figure comprises 72% of all adult offenders under correctional supervision. Clearly, an affirmance of the Eighth Circuit's opinion would have drastic ramifications nationwide. 14 CRIM. JUST. NEWSL. 4 (Oct. 10, 1983).

> sion on Romano's habeas petition. So, the Court held an evidentiary hearing to allow the parties to adduce additional evidence and testimony on this matter. The parties chose not to present testimony and relied solely on the attorney's oral argument. *Romano, supra,* 567 F.Supp. 882 (D.C. Mo. 1983) (P.A. 31).

This statement is not true. The district court did not allow the introduction of evidence. The district judge would allow *only* oral argument. After Judge Cahill issued his opinion, counsel for petitioner (then respondent) introduced "Respondent's Motion to Amend the Judgment, Vacate or Set Aside the Judgment and Grant An Evidentiary Hearing," filed in the record on June 29, 1983. Respondent Romano also realized the erroneous finding and filed a "Motion to Correct Technical Error In Memorandum Opinion of June 20, 1983" on June 27, 1983.

In response to these dual motions the district court issues an order on July 1, 1983 removing the following language:

> So, the court held an evidentiary hearing to allow the parties to adduce additional evidence and testimony on this matter. The parties chose not to present testimony and relied solely on the attorneys' oral argument.

The court replaced this language with the following:

> Therefore, the Court granted Romano's motion for oral argument in order to obtain answers to any questions the Court had concerning the circumstances surrounding this case.

Thus, the opinion still includes Judge Cahill's finding that the record was insufficient. Petitioners are not able

to say whether the Eighth Circuit was aware of this discrepancy. The Eighth Circuit's failure to even address the argument by petitioners that there should have been an evidentiary hearing may well have resulted from a mistaken belief that petitioners had waived any claim to such a hearing. The court should nonetheless have been aware of the mistake as the district judge's amendment to his opinion was in the record. The result is that the Eighth Circuit affirmed the district court's shift of the burden of proof to petitioners and then tacitly affirmed that court's refusal to give petitioners an opportunity to carry that burden. The burden of proof in a habeas corpus hearing is on the prisoner petitioning for such relief and *not* on the state. *Hawk v. Olson*, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61 (1945).

B) The courts below followed the wrong standard of review and thus granted respondent a writ of habeas corpus because the petitioners "failed" to "prove" that the state court's decision was constitutional.

When a federal court is reviewing state judicial proceedings for their validity under the United States Constitution, the scope of review is narrower than when that same federal court reviews a federal court below it. The scope of review of a state court proceeding is "the narrow one of Due Process", and "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice' ". *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 1877, 70 L.Ed.2d 431 (1974). The scope of review is limited to a determination of whether the state body acted arbitrarily or capriciously or whether, as a matter of law, there

has been no violation of probation. See, *Martineau v. Perrin*, 601 F.2d 1201 (10th Cir. 1979). The scope is narrow because federal courts do not have supervisory power over state courts. *DeChristoforo, supra; Milton v. Wainwright*, 407 U.S. 321, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972). A federal court must not overrule a state court's decision merely because it disagrees with the state court regarding the weight of the evidence. *Maggio v. Fulford*, ... U.S. ....., 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983). Thus, federal courts are required to afford state court findings a "presumption of correctness." *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

Yet, the courts below nonetheless strongly attacked the findings of Judge Whipple. In their zeal to release respondent, they denied Judge Whipple's findings their due presumption of correctness by reading the record in a light most favorable to respondent which is itself contrary to established precedent in habeas corpus proceedings involving state prisoners. The court below simply distorted the record.

The court below clearly sought to characterize respondent's probation violation as minor or technical. The Eighth Circuit stated: "The facts do not compel a conclusion that Romano's effort at rehabilitation had failed or that he represented a danger to himself or society." *Romano, supra*, 735 F.2d at 323 (P.A. 21). The court accused Judge Whipple of ignoring mitigating evidence, yet the court ignored a specific evidentiary finding and supporting evidence when it stated: "While it is true that Romano did not immediately report the accident and that he did leave the scene, given his other post-accident behavior it hardly can be said that he sought to escape responsibility for his actions." *Id.* at 323. This observation ignores the fact that witnesses testified that Romano came to the hospital and attempted to shift responsibility for the accident

to his victim (J.A. 79, 83, 87). Respondent also failed to report his accident (J.A. 89).

The courts below made much of the fact that the event that led to respondent's probation revocation resulted only in a misdemeanor conviction for careless and reckless driving. Respondent was convicted in a bench trial (see Exhibit D of Respondent's Amended Petition for Writ of Habeas Corpus). Obviously, once respondent's probation had been revoked and his twenty-year sentence reinstated, county officials saw no need to go through the expense and time of a felony jury trial. In fact, the prosecutor may very well have reduced the charges in exchange for Romano's waiver of a jury. Such things are a common occurrence when probation has been revoked.

There was more than sufficient evidence from which Judge Whipple could find that respondent committed the felony of leaving the scene of an accident. There was even enough evidence to convict respondent. *State v. Cochran*, 496 S.W.2d 825 (Mo. banc 1973). Thus, there is no grounds for the Eighth Circuit's implied challenge to Judge Whipple's findings, and thus, analysis of the weight that ought to be accorded to the evidence reduces the presumption of correctness Judge Whipple is entitled to without justification.

Moreover, both courts treated respondent as though he were a first offender. But the record plainly discloses that respondent had previously been arrested for narcotics violations twice and been convicted once (J.A. 25-27).

The circuit court sought to bolster the credibility of Mr. "Slick" Romano by saying that respondent's behavior after running down his friend did not indicate that respondent sought to escape responsibility for his action. To the contrary, respondent's behavior after striking his victim

clearly demonstrated his attempt to escape responsibility for his actions.

The record shows that respondent's car was found, not at his house, but at the home of his long-time friend and employer (J.A. 71). The record shows that, when found, his car was parked not on the street, but at the end of the driveway farthest from the street (J.A. 71). The record shows that, when found, the car was covered with a floor mat to conceal the damage that had been done to it in striking the victim (J.A. 72). Moreover, who can say what respondent's condition was at the time he drove into the victim Bradley? The witnesses' description of the movement of respondent's car immediately prior to the collision (speeding; wild U turn; crossing the center line) (J.A. 59) at least gives rise to a reasonable inference that respondent might have been intoxicated with some drug—alcohol, marijuana, or something else. But respondent's flight and concealment for the next 12 hours prevented any determination of his condition at the critical moment. Finally, although the record is not as clear on this point as it might be, it is a reasonable inference that respondent was concealed in the home of his long-time friend, and did not go to the hospital to visit the victim until he knew the police had discovered his car. Respondent's drug conviction was "not an offense against the body or person of another." (J.A. 43); the offense that justified revoking probation was.

The Eighth Circuit also stated that Judge Whipple gave respondent the maximum sentence (P.A. 20). However, under Missouri law, the maximum sentence for the sale of a controlled substance is 5 years to life for the first offense. 195.200(4) Revised Mo. statutes (1969). This remains the penalty today. Thus, Judge Whipple gave a lenient sentence. In that respondent was seeking to deal in

heroin at the time of his arrest, the sentence given was consistent with other sentences involving heroin cases in the area of Laclede County (J.A. 37).

Therefore, we can see that the Eighth Circuit ignored the presumption of correctness to which Judge Whipple's findings were entitled and that the courts below distorted the facts to refute the state judge's findings and support their release of a state prisoner. The courts ignored the clear evidence that Judge Whipple considered alternatives and, by shifting the burden of proof to petitioners, ignored and in fact sought to disprove the presumptively correct findings that supported the state judge's decision, and denied petitioners an opportunity to present evidence that Judge Whipple provided respondent with full Due Process. The Eighth Circuit's paternalistic handling of a Missouri state court decision is unjustified. It was error for the Court to affirm a decision that shifted the burden of proof to petitioners to come forward with evidence to prove that alternatives to incarceration were considered, then denied to petitioners the opportunity to provide that proof. The Eighth Circuit must be reversed.

IV. THE EIGHTH CIRCUIT ERRONEOUSLY DENIED THE STATE OF MISSOURI AN OPPORTUNITY TO CORRECT ANY DEFECT IN THE DUE PROCESS GIVEN TO RESPONDENT, WITHOUT JUSTIFICATION, AND GAVE RESPONDENT OUTRIGHT RELEASE.

If this Court elects to affirm the Eighth Circuit's determination that Due Process requires an expressed consideration of alternatives to incarceration by the judge revoking probation, then this Court should nonetheless reverse the Eighth Circuit's affirmance of the remedy granted respondent: outright release. In light of the fact that

no prior Supreme Court ruling requires that alternatives to incarceration be expressly considered in *all* probation revocation hearings, and in light of the fact that it is clear that the state judge did in fact consider alternatives to incarceration, the remedy granted by the district court and affirmed by the Eighth Circuit can only be viewed as drastic and punitive against the State of Missouri.

Assuming that respondent was denied Due Process, there is no question but that the appropriate remedy was to require the State of Missouri to hold a new probation revocation hearing to see if there were in fact viable alternatives to respondent's incarceration. In *Morrissey*, this Court did not grant outright release. In *Gagnon*, after finding that Scarpelli's probation was revoked without *Morrissey* Due Process, this Court stated: "On remand, the District Court should allow the state an opportunity to conduct such a hearing." *Id.*, 411 U.S. at 791, 92 S.Ct. 1764. In *Bearden*, this court remanded the case to the state for a consideration of alternatives to incarceration.

Likewise, there is no question but that federal courts should give states an opportunity to remedy a Due Process defect in a particular proceeding before they deprive a state of its right to incarcerate an otherwise properly convicted defendant. This is especially true in the case of probation revocation where there are no Due Process deficiencies in either the conviction or sentencing. Outright release is an extraordinary remedy traditionally granted only as a last resort when a state has failed to comply with a court order to remedy a constitutional defect.[6] Even the Eighth Circuit has previously applied

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6. The cases wherein federal courts have given a state an opportunity to correct a due process deficiency are legion. As a representative sampling, petitioner offers the following cases:

(Continued on following page)

this principle. *Robinson v. Wyrick*, 635 F.2d 757 (8th Cir. 1981).

Alternatives to incarceration could have been considered on rehearing by ordering a new presentence report and by taking arguments of counsel on the issue. *Then* if the *state* judge found that there was a realistic alternative to respondent's incarceration, the judge could have released respondent outright. If the state judge did not, then the district court would still have had jurisdiction to review the state court findings and release respondent. In so doing the federal district court would have avoided substituting its own discretion for that of the state judge hearing the probation revocation. *Billiteri v. United States Board of Parole*, 541 F.2d 938 (2nd Cir. 1976).

There is an obvious reason why ordering rehearing is the only appropriate remedy: to give the state the opportunity to conduct a proper hearing. *Gagnon, supra.* Even the Eighth Circuit previously held that a State's right to hold a revocation hearing should not be taken away in the absence of a showing of *demonstrated prejudice* severe enough to render the revocation hearing itself inadequate in terms of relief. *Cleveland v. Ciccone*, 517 F.2d 1082 (8th Cir. 1975). Thus, in *Gagnon*, this Court held that the state should be allowed to hold a rehearing even though the prisoner had served *three years* after revocation and was paroled before his habeas corpus petition was decided, facts extremely similar to the present case. It cannot be said that respondent suffered any deprivation

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Footnote continued—

Dennis v. Solem, 690 F.2d 145, 147 (8th Cir. 1982) (per curiam), (no writ issued where state remedied previous constitutional defect); *Guthrie v. Warden, Maryland State Penitentiary*, 683 F.2d 820, 877 (4th Cir. 1982) (state given reasonable time to retry); *United States ex rel. Masserella v. Elrod*, 682 F.2d 688, 690 (7th Cir. 1982), cert. denied, 103 S.Ct. 1426, 1427.

until a state judge ascertains if reasonable alternatives existed.

The courts below argued that respondent's original probationary period had passed and thus respondent should be released. Again, this is not true. Judge Whipple made it clear that Missouri law precluded a probation term of more than five years at a time but that he could and would add five years to that after the first terms was served (J.A. 43). Thus, respondent actually was given ten years probation. Moreover, to the extent that a rehearing revealed that no valid alternatives existed, respondent was properly on parole.

Petitioners Black and Moore suggest that it is the province of the state and the state alone to decide when a prisoner has served enough time, unless a sentence is shown to be constitutionally excessive. Even if one were to accept that the amount of time respondent spent in prison should be considered, respondent was the one who waited over four years before seeking a state or federal habeas corpus challenging the probation revocation. The State of Missouri should not be made to suffer the prejudice of respondent's outright release when that release is based on a delay caused solely by respondent. See *McDonnell v. Estelle,* 666 F.2d 246 (5th Cir. 1982).

Moreover, the state has a right to observe convicted felons on a conditional release basis before giving them total freedom, unless that felon's conviction was constitutionally defective. Since respondent was not subject to the temptations and opportunities that face law-abiding citizens in society while he was in prison, the court below has effectively ordered the State of Missouri to release a felon when the State cannot assure its citizens that that felon has been sufficiently rehabilitated so as not to constitute a risk to society.

Clearly, "a release from confinement . . . is an *extraordinary remedy* that deserves further discussion." *Green v. Nelson,* 442 F.Supp. 1047 (D.C. Conn. 1977). While it is true that in *Green* the prisoner was released, this was because the United States Parole Commission had engaged in numerous acts violating the constitutional rights of prisoners and had ignored court rulings against the Board. The court in *Green* decided, after fully considering the ramifications of release, that firm measures were required to ensure that the Commission acted constitutionally. *Id.* at 1060. The present case in no manner presents a situation where there is a need to release respondent in order to punish the State of Missouri for repeated violations.

The district court and court of appeals below suggest that there is some prejudice to respondent if he is subjected to the possibility of reincarceration. The Eleventh Circuit Court of Appeals made an excellent response to this issue in *United States ex rel. Graham v. United States Parole Commission,* 732 F.2d 49 (11th Cir. 1984). In *Graham,* an inmate had sought a writ of habeas corpus challenging certain parole regulations. Before his request was decided, he was released on parole. He appealed the dismissal of his case as moot on the grounds that, should he violate his parole, he would be reincarcerated and again subject to the "unconstitutional" parole regulations. The court responded "We believe this potential controversy is too *speculative* for adjudication". *Id.* at 850 (emphasis added).

The Eighth Circuit cited *Iasigi v. Van de Carr,* 166 U.S. 391, an 1897 Supreme Court case, as one the state should *see* to support the Court's ruling that Romano's release was not an abuse of discretion. *Iasigi does not even marginally support the drastic actions taken by the district court in*

the present case. Joseph Iasigi was arrested in the City of New York on charges of embezzlement arising in the State of Massachusetts. Iasigi filed a *habeas corpus* petition alleging that he could not be sent to Massachusetts because, at that time, he was the duly recognized Counsel General of the Sultan of Turkey. The district court denied the writ and remanded Iasigi to state custody. On appeal, the Supreme Court found that at the time Iasigi was remanded to state custody, he was no longer the Turkish Sultan's Counsel General, and thus the remand was affirmed. Clearly, not only does *Iasigi* not support the ruling that Missouri should be denied a chance to hold a new revocation hearing for respondent, but it is so totally unrelated to the issues before this Court, that its citation suggest plain error, requiring a reversal. The only portion of the entire opinion even marginally related to the present case is a portion quoting Justice Gray in *Nishimura Ekiu v. United States,* 142 U.S. 651, where the judge said:

> "A writ of habeas corpus is not like an action to recover damages for unlawful arrest or commitment, but its object is to ascertain whether the prison can legally be detained in custody; and if sufficient ground for his detention by the government is shown, *he is not to be discharged for defects in the original arrest or commitment.*"

Iasigi, supra at 393 (emphasis added). This quotation supports petitioners' contention that a mere defect in a revocation hearing, committing respondent to prison, does not justify his discharge from custody by a federal court. Therefore, an error has occurred in that the Eighth Circuit refused to hold the district court abused its discretion in completely releasing a convicted felon validly sentenced to twenty-years in prison without first giving the State of

Missouri an opportunity to provide respondent with a hearing in accordance with the court's ruling. The law on this issue was clearly overlooked and misapplied, justifying a reversal.

CONCLUSION

The decision of the Eighth Circuit under review should be reversed and respondent returned to his status as a parolee in the custody of the Missouri Board of Probation and Parole.

Respectfully submitted,

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